IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 9206 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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CITICHEM INDIA LTD & 1 - Applicant(s)
Versus
GUJARAT ALKALIES AND CHEMICALSLTD & 1 - Respondent(s)

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Appearance :
MR DIPEN C SHAH for Applicant(s) : 1 - 2.
NANAVATI ASSOCIATES for Respondent(s) : 1,
MR M.R.MENGDEY, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 14/09/2007

ORAL JUDGMENT

1. By way of this application under Section 482 of the Criminal Procedure Code ('***Cr.P.C.***' for short),

the petitioners – original accused have prayed for an appropriate order to quash and set aside the complaint being Criminal Case No. 2093 of 2003 pending in the Court of learned Chief Judicial Magistrate, Vadodara.

2. A complaint being Criminal Case No.2093 of 2003 came to be filed by respondent No.1 herein-original complainant against the petitioners in the Court of Chief Judicial Magistrate, Vadodara for the offences punishable under Section 138 read with Sections 141 and 142 of the Negotiable Instruments Act; 1981 ('***N.I.Act***' for short) alleging inter-alia that the complainant had delivered goods to accused Nos. 1 and 2 by raising various invoices and bills aggregating to Rs.82,03,945.50ps. as on 02.04.2003. The said invoices and bills were accepted by accused Nos. 1 and 2 without any demur or dispute. It was further averred in the complaint that accused No.2 i.e. petitioner No.2 herein for and on behalf of accused No.1, in part payment of the acknowledged debt issued complainant two cheques on 10.10.2002 for an amount of Rs.1,20,943/- and Rs.80,000/- respectively. That both the cheques were deposited in the Bank on 20.03.2003 and both the cheques were

returned by the Bank with an endorsement 'payment stopped by drawer' and intimation to that effect was received by the complainant on 28.08.2003. That the accused persons were served with statutory notice as required under Section 138 of the N.I.Act. on 23.04.2003 and as accused Nos. 1 and 2 failed and neglected to pay amount to the complainant towards said cheques, impugned complaint came to be filed for the offences punishable under Section 138 read with Sections 141 and 142 of the N.I.Act. That the learned Chief Judicial Magistrate issued summons upon the petitioners for the offences punishable under Section 138 read with Sections 141 and 142 of the N.I.Act. Hence, the petitioners have preferred the present application under Section 482 of the Cr.P.C.

3. Mr.Dipen Shah, learned Advocate appearing on behalf of the petitioners original accused has vehemently submitted that in the reply to the statutory notice itself the petitioners offered to make payment towards the cheqeus in question and once there was offer to make payment which has not been accepted by the complainant it cannot be said the petitioners have committed any offence under Section 138 of the N.I.Act. It is submitted that even reply

to the notice has not been produced by the original complainant along the complaint and therefore, there is suppression and; that the learned trial Court has committed error in issuing summons upon the petitioners. It is submitted that even at the relevant time when the cheques were returned by the Bank the amount in the Bank Account was more than cheques, therefore, it cannot be said that the petitioners have committed any offence under Section 138 of the N.I.Act. Therefore, it is requested to allow the present application by quashing and setting aside the impugned complaint.

4. On the other hand, learned Advocate appearing on behalf of the original complainant has submitted that so called offer made by the petitioners in the reply to the show cause notice cannot be said to be offer for making payment towards the cheque amount so as to take out a case under Section 138 of the Act. It is submitted that as such even considering the offer in the reply to the statutory notice it is conditional offer and therefore, the same cannot be considered to be valid offer for making the payment. Under the circumstances when cheques have been returned and all the

ingredients / conditions making out a case under Section 138 are satisfied impugned complaint is not required to be quashed and set aside in exercise of powers under Section 482 of the Cr.P.C. It is submitted that even otherwise whatever submitted by the petitioners can be said to be their defences which are required to be considered at the time of trial on leading proper evidence. Therefore, it is requested to dismiss the present application.

4. Mr.M.R.Mengdey, learned Additional Public Prosecutor appearing on behalf of the respondent - State has requested to pass an appropriate order considering the impugned complaint and he has submitted that as case against petitioners for the offence under Section 138 of the N.I.Act has been made out, it is requested to dismiss the present application.

5. Heard the learned Advocates appearing on behalf of the respective parties.

6. At the outset is required to be noted that this is an application under Section 482 of the Cr.P.C., and as held by the Hon'ble supreme Court in the case of ***M/s. M.M.T.C.Ltd. & Anr. V/s. M/s. Medchl***

Chemicals & Pharma (P) Ltd & Anr. reported in *AIR 2002 SC 182* the powers under Section 482 to quash and set aside the impugned complaint has to be exercised sparingly and in exceptional cases. In the present case criminal case has been filed against the petitioners under Section 138 read with Sections 141 and 142 of the N.I.Act. Cheques were issued by the petitioners which came to be deposited by the original complainant and they were returned with an endorsement 'payment stopped by drawer'. As held by the Hon'ble Supreme Court on any ground if the cheques are returned, the persons who has issued the cheques is liable for punishment under Section 138 of the N.I.Act is to be prosecuted. It is the contention on behalf of the petitioners that in the reply to the statutory notice the petitioners' made an offer to make the payment under the cheques in question which has not been accepted by the original complainant though the petitioners were ready and willing to give other cheques against the original cheques, therefore, it cannot be said that the petitioners have committed any offence under Section 138 of the N.I.Act. On considering the reply to the statutory notice and alleged offer made by the petitioners it appears to the Court that offer made

by the petitioners was conditional offer and it cannot be said that the petitioners were ready and willing to make the payment under the cheques in question. Under the circumstances, the contention on behalf of the petitioners to quash the complaint on the ground that no case is made out under Section 138 of the Act cannot be accepted. Whatever is submitted on behalf of the petitioners are all their defences which are required to be considered only at the time of trial on leading proper evidence and considering the fact that all the ingredients of Section 138 of the N.I.Act are satisfied no case is made out to quash and set aside the complaint filed under Section 138 of the N.I.Act. The contention on behalf of the petitioners that in the complaint there is no mention to the reply to the statutory notice and therefore, impugned complaint requires to be quashed and set aside also cannot be accepted. For the purpose of filing the complaint necessary averments making out a case for the offence under Section 138 and/or Sections 141 and 142 of the N.I.Act are to be made and mere non mention of reply to the statutory notice is no ground to quash and set aside the impugned complaint if all other ingredients making out a case under Section 138 are fulfilled.

7. For the reasons stated above, there is no substance in the present application, same deserves dismissal and accordingly it is dismissed. Notice discharged. Ad interim relief if any stands vacated forthwith.

[M.R.Shah, J.]

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